Petition

No. 81-1431

IN THE

Supreme Court of the United States

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JOINT COUNCIL OF TEAMSTERS NO. 42, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and GENERAL TEAMSTERS AND FOOD PROCESSORS LOCAL NO. 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.; THE BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC.; THE ENGINEERING CONTRACTORS ASSOCIATION, INC.; and THE SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented for Review.

WHETHER OWNER-OPERATORS WHO HAVE BEEN FOUND NOT TO BE EMPLOYEES FOR PURPOSES OF NATIONAL LABOR RELATIONS BOARD JURISDICTION UNDER SECTION 2(3), 29 U.S.C. §152(3), ARE PERMITTED TO PARTICIPATE IN LABOR-MANAGEMENT TRUST FUNDS ESTABLISHED PURSUANT TO SECTION 302(c)(5) OF THE LABOR/MANAGEMENT RELATIONS ACT, 29 U.S.C. §186(c)(5).

Parties to the Proceeding.

The following are parties to this proceeding:

(1) Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and General Teamsters and Food Processors, Local No. 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(2) The employer members of Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association and Southern California Contractors Association.

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America (''Unions'') pray that certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case.

OPINIONS BELOW.

The *per curiam* opinion of the Ninth Circuit Court of Appeals is officially reported at 662 F.2d 531 (9th Cir. 1981).[1]

The opinion of the District Court for the Central District of California is officially reported at 520 F.Supp. 3 (C.D. Cal. 1980).[2]

JURISDICTION.

The memorandum of the Ninth Circuit Court of Appeals affirming the District Court's order and judgment was entered October 1, 1981.

An order redesignating the memorandum a *per curiam* opinion for publication was entered November 1, 1981. Petitioners were uncertain whether the memorandum of October 1, 1981 or the order filed November 9, 1981 controlled for purposes of determining the date of entry of judgment.

On December 3, 1981 Petitioners applied to this Court for an order establishing the final date and for an extension of time within which to petition for certiorari. On December 8, 1981 the Honorable William H. Rehnquist, Associate Justice of this Court granted an extension to January 29, 1982.

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[1]The memorandum which has been redesignated a *per curiam* opinion is set forth in full in Appendix i.

[2]The opinion of the District Court is set forth in full in Appendix ii.

Petitioners believe the date and time of entry of judgment to be November 1, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED.[1]

Section 2(3), 29 U.S.C. §152(3), provides in pertinent part:

> The term 'employee' shall . . . not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or *any individual having the status of an independent contractor*, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined [emphasis added].

Section 302, 29 U.S.C. §186, generally prohibits payment of money to a labor organization by an employer. An exception is set forth in Section 302(c)(5), 29 U.S.C. §186(c)(5):

> The provision of this section shall not be applicable . . . with respect to money . . . paid to a trust fund established . . . *for the sole and exclusive benefit of . . . employees* . . . and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on

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[1]Full texts of pertinent statutory provisions appear in Appendix iii.

> retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance . . . [emphasis added].

Section 501(3), 29 U.S.C. §142(3), provides in pertinent part:

> The terms . . . 'employee,' . . . shall have the same meaning as when used in subchapter II of this chapter [the original NLRA[4]] as amended by this chapter [the LMRA[5]].

STATEMENT OF THE CASE.

A. Petitioners' Complaint.

This case raises a significant issue about voluntary participation in labor-management trust funds.

Petitioning Unions initiated their complaint in the United States District Court for the Central District of California on August 28, 1979 seeking a declaratory judgment to determine their rights and liabilities under a collective bargaining agreement.

The jurisdiction of the District Court was invoked pursuant to 29 U.S.C. §185(a), 29 U.S.C. §186(e) and 28 U.S.C. §2201.

B. Statement of Facts.

1. The Collective Bargaining Agreement.

The parties to this action are parties to a collective bargaining agreement, known as the Master Labor Agreement ("MLA"), which Petitioners negotiate on behalf of their

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[4]The original NLRA refers to the original National Labor Relations Act, ch. 372, 49 Stat. 449 *et seq.*, as amended, now a portion of the Labor Management Relations Act, 29 U.S.C. §§151-168.

[5]The LMRA refers to the Labor Management Relations Act, 29 U.S.C. §§141-187.

bargaining unit members with Respondents who negotiate on behalf of their members who are employers in the building and construction industry in Southern California ("the employers").

The MLA requires that the employers make contributions to jointly administered labor-management trust funds on behalf of all employees covered by the agreement.[6] The trust funds are established pursuant to Section 302(c)(5). The trust funds provide benefits for medical and hospital care, vacations and job training.

The MLA includes within its definition of the term "employee," persons known as "owner-operators." An "owner-operator" is defined by the MLA as: "an individual that holds legal or registered title to a motor vehicle or to the power equipment unit thereof in his name and who personally drives such vehicle or unit in the performance of work covered by this Agreement." The MLA covers owner-operators only while performing work at the construction job site.

2. Owner-operators.

Owner-operators perform the same job duties as other covered "employees" on the job site. They are usually paid on an hourly basis. The California Public Utility Commission minimum tariff serves as an hourly floor. They may negotiate for higher rates or refuse a job offer.

Owner-operators work alongside other workmen on the construction job site, observe the same starting and quitting times and breaks as others and follow the same instructions given by the employers' representatives who oversee the performance of other covered "employees" on the job site.

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[6]Pertinent collective bargaining agreement provisions are set forth in Appendix iv.

The employers have reprimanded owner-operators and docked their pay for poor job performance. Owner-operators are subject to roughly the same amount and kind of direct supervision as other workmen.

3. Related Decisions.

These factors have led the National Labor Relations Board and Courts of Appeal to take differing positions regarding the relationship between the employers and owner-operators. Presently, there is a conflict among the Circuit Courts of Appeal regarding the status of owner-operators for purposes of National Labor Relations Board jurisdiction.

In the Ninth Circuit, owner-operators have been held to be independent contractors who therefore do not qualify as employees within the meaning of Section 2(3). *See Associated General Contractors v. NLRB*, 564 F.2d 271, 281 (9th Cir. 1977). In the District of Columbia Circuit, the opposite result was reached. *See Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1329 (D.C. Cir. 1971). *But cf. Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 v. NLRB*, No. 80-1807, slip op. at 10-12 (D.C. Cir. December 4, 1981).

4. The Present Controversy.

In compliance with the MLA and its predecessors, the employers have for the past ten years made contributions on behalf of owner-operators to the trust funds. However, following the decision of the Ninth Circuit in *Associated, supra*, a dispute arose over the continuing legal obligation of the employers to make such contributions.

The employers contended that contributions and provision of benefits to owner-operators was no longer permissible pursuant to Section 302 because the owner-operators no longer qualified as employees within the meaning of Section

2(3). They announced their intent to cease making contributions.

Petitioners contended that even though owner-operators may not be employees for purposes of National Labor Relations Board jurisdiction under Section 2(3), they should be treated as employees within the meaning of Section 302(c)(5) and contributions to the trust funds are lawfully required by the MLA.

C. Proceedings and Disposition Below.

To resolve the dispute, Petitioners brought this action in the United States District Court for the Central District of California. The District Court granted Respondents' motion for judgment on the pleadings finding that contributions could not be required and benefits could not be extended to owner-operators. The District Court held that Section 501(3) automatically required the exclusion of owner-operators from participation in labor-management trust funds established pursuant to Section 302(c)(5) because, as independent contractors, they were excluded by definition from Section 2(3). Judgment was entered on October 24, 1980.

Petitioners appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the lower court in its memorandum of October 1, 1981. On November 9, 1981 the memorandum disposition filed October 1, 1981 was redesignated a *per curiam* opinion for publication. Petitioners now seek review of the Ninth Circuit's judgment.

ARGUMENT.

This writ should be allowed for the following reasons:

I.

There Now Exists a Conflict Among the Circuits as to Whether the Standard of Statutory Construction Applicable to Section 302(c)(5) Automatically Requires Disqualification of Persons Excluded by Definition From Section 2(3).

By affirming the lower court, the Ninth Circuit has applied an erroneous standard of statutory construction to Section 302(c)(5).

The lower court's conclusion that a literal reading of Section 501(3) automatically mandates disqualification of owner-operators from participation in labor-management trust funds merely because of their exclusion from Section 2(3) is in error.

By adopting the lower court's rationale, the Ninth Circuit has compounded the error.

The lower court and Ninth Circuit's interpretation is notable only for brevity as it contradicts the standard of statutory construction properly applied in similar circumstances by the Second, Eighth, Third, Sixth and, most recently, Seventh Circuit Courts of Appeal and is also contrary to the standard applied by the Ninth Circuit itself in an earlier case.

On its face, the Ninth Circuit's interpretation appears logical. Yet, that same logic has been uniformly rejected by other Circuit Courts of Appeal. To understand why such an apparently proper interpretation has been consistently rejected, it is important to first survey the various components of the LMRA.

The LMRA was preceded by the NLRA. The original NLRA, commonly referred to as the "Wagner Act," ch. 372, 49 Stat. 449 *et seq.* (1935), was enacted to "ensure that employers and their employees could work together to establish mutually satisfactory conditions [of employment]." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103, 90 S.Ct. 821, 823 (1970). To accomplish its goal, "a general process was established that would ensure that employees as a group could express their opinions and exert their combined influence . . . . The Board [was created] to see that the process worked." *Id.*, at 397 U.S. 103, 90 S.Ct. 823.

In this context, the original NLRA set forth, in Section 2(3), a definition of the term "employee." *See* NLRA, ch. 372, § 2, 49 Stat. 450 (1935).

In 1947, the LMRA was enacted. It absorbed the NLRA and added four titles. Title I was the original NLRA, as amended; Title II dealt with national emergencies; Title III, containing Section 302(c)(5), dealt, in part, with employer contributions to trust funds; Title IV dealt with establishment of a committee on labor relations; and Title V, containing Section 501(3), dealt with definitions. *See* LMRA, ch. 120, Titles I-V, 61 Stat. 136 *et seq.* (1947).

Because of the significantly diverse interests addressed in each title of the LMRA, other Courts of Appeal (as well as this Court) have refused to apply, *in pari materia*, the definition of "employee" as set forth in Section 2(3) to other titles of the LMRA notwithstanding the seemingly literal requirement of Section 501(3).

In *United States v. National Marine Engineers' Beneficial Association*, 294 F.2d 385, 390-391 (2d Cir. 1961) Judge Friendly set forth the appropriate standard of statutory construction. The appeal was from a lower court issuance of a Title II injunction over a strike in the maritime industry.

On appeal, the union argued that the provision of Title II, Section 208, 29 U.S.C. §178, permits federal courts to enjoin a "strike;" that Section 501(2), 29 U.S.C. §142(2), defines the term "strike" to mean "any strike . . . by employees . . . ."; that Section 501(3) says that "employees" has the same meaning as when used in Section 2(3); that Section 2(3) excludes, by definition, supervisors from employee status; therefore, a strike by the union (whose members were admittedly supervisors) was not within the scope of Title II.

Rejecting the argument, Judge Friendly commented at 294 F.2d 390-391:

> [N]ot only are we not required, we are not permitted to interpret statutes in the mechanical fashion for which appellants contend [citations omitted] . . . . [I]f giving the words of the statute their natural significance 'leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further . . . . sacrificing, if necessary, the literal meaning in order that the purpose may not fail.' *Ozawa v. United States*, 260 U.S. 178, 194, 43 S.Ct. 65, 67 (1922).

Thus, the holding of *National MEBA* is that disqualification from the jurisdiction of the National Labor Relations Board, pursuant to Section 2(3), does not automatically carry over to other titles of the LMRA, notwithstanding a literal reading of Section 501(3). *Id.*, at 294 F.2d 391-393. *See also Isbrandtsen Co. v. District 2, Marine Engineers Beneficial Association*, 256 F.Supp. 68, 74-75 (E.D.N.Y. 1966) ("[T]he history of § 2(3) of the National Labor Relations Act and of LMRA §§ 301 and 501(3) supports the view that the supervisor exclusion of NLRA § 2(3) does not apply to LMRA § 301.").

Other circuits have adopted holdings consistent with *National MEBA*, and *Isbrandtsen*.

In *Blassie v. The Kroger Co.*, 345 F.2d 58, 68 (8th Cir. 1965) Justice Blackmun considered whether Section 302(c)(5) restricts enjoyment of trust fund benefits to persons in active employment: "We would prefer to approach our present task with a construction policy favoring inclusion and benefits where there is no positive statutory language or inference of exclusion . . . ." The *Blassie* court held that retired persons could be included within Section 302(c)(5) and further held that union officers could also participate because a union officer "is no less an employee for the purposes of . . . § 302(c)(5) because he may also possess managerial capacity . . . ." *Id.*, at 345 F.2d 73. Although the holding of *Blassie* is not necessarily inconsistent with Section 2(3), *see Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 169-171, 92 S.Ct. 383, 392-393 (1971), and although Section 501(3) is not specifically addressed, the standard of statutory construction is the same as set forth in *National MEBA*.

In *Crilly v. Southeastern Pennsylvania Transportation Authority*, 529 F.2d 1355, 1359-1363 (3d Cir. 1976), the Third Circuit followed the holding of *National MEBA*. In *Crilly* the employer argued that it was a political subdivision and thus not an employer within the meaning of Section 2(2), 29 U.S.C. §152(2); that Section 301(a), 29 U.S.C. §185(a), authorizes suits only between labor organizations and employers; and that by crossreferencing the definitions as required by Section 501(3), no suit could be brought. While the court ultimately agreed on other grounds that no suit could be brought it soundly rejected the suggestion that it do so on the basis of a literal application: "several significant decisions have cautioned that literalism may not be

the appropriate canon of statutory construction." *Id.*, at 529 F.2d 1359.

The Sixth Circuit applied the *National MEBA* standard in *District 2, Marine Engineers Beneficial Association v. Amoco Oil Company*, 554 F.2d 774, 776-779 (6th Cir. 1977). In *District 2, MEBA* the District Court had applied the same literal application adopted by the Ninth Circuit here. The Sixth Circuit rejected that application: "Only if the legislative history . . . fails to expose the rationale underlying the exclusion will we consider whether the District Court's literal reading of 29 U.S.C. § 142(3) is compatible with the policy objectives of Section 301(a)." *Id.*, at 554 F.2d 776-777. The Court concluded that the legislative history of the LMRA supported the view that Congress did not intend to exempt supervisors from the jurisdiction of the National Labor Relations Board and the other protections afforded by the LMRA: "The legislative history of the Labor-Management Relations Act makes it abundantly clear that Congress wished to insulate an employer's interaction with its supervisors from only those constraints imposed by Title I." *Id.*, at 554 F.2d 777.

In 1978, the Seventh Circuit followed a similar standard of statutory construction in *Reiherzer v. Shannon*, 581 F.2d 1266, 1275-1276 (7th Cir. 1978). There, the court was required to determine whether a self-employed person who was arguably a supervisor within the meaning of Section 2(3) was entitled to benefits from a labor-management trust fund established pursuant to Section 302(c)(5). Although the court based its ruling on the language of the trust agreement and did not specifically address the application of Section 501(3), it specifically rejected the contention that benefits could not be paid to supervisors simply because they "are not, by definition, employees." *Id.*, at 581 F.2d 1275. The court stated: "Although this syllogism has facial

appeal, it is completely without merit." *Id.*, at 581 F.2d 1275. Moreover, the court specifically referred to the legislative history of the LMRA as well as to decisions of this Court in concluding that "the use of the term 'employee' in Section 302 has a broader scope than as defined by Section 2(3)." *Id.*, at 581 F.2d 1276.

Finally, the Ninth Circuit itself has expressly applied the *National MEBA* standard in a similiar context. In *Dente v. International Organization of Masters, Mates and Pilots*, 492 F.2d 10, 12 (9th Cir. 1974), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607 (1974), the court was asked to determine whether a union which represented only supervisory employees was within the scope of Section 301(a), 29 U.S.C. §185(a). Because Section 2(3) specifically excludes supervisors from its definition of employees and because a labor organization is one in which employees must participate pursuant to Section 2(5), 29 U.S.C. §152(5), it was argued that a union made up entirely of supervisors is, by virtue of Section 501(3), not a labor organization within the meaning of Section 301(a). The court specifically rejected that argument which parallels the argument it accepted here:

> This rather mechanical approach to the statutory interpretation has found some judicial adherents [citations omitted]. We, however, agree with the Second Circuit that Congress, by eliminating supervisory employees from the bargaining and organizational protection of subchapter II, did not intend to deprive members of 'supervisory unions' of the rights secured by Section 301. *Id.*, at 492 F.2d 12.

While Petitioners have found no case which specifically addresses whether Congress intended the statutory exclusion of independent contractors set forth in Section 2(3) to apply to the provisions of Section 302(c)(5), Petitioners contend that the proper standard of statutory construction, accepted

consistently by other Courts of Appeal as well as the Ninth Circuit, requires such an inquiry and, without doubt, rejects automatic disqualification pursuant to Section 501(3) without first engaging in such inquiry.

Because, prior to the instant matter, other Courts of Appeal have uniformly rejected the *pro forma* mechanical standard of statutory construction applied here, there now exists a significant conflict among the Circuit Courts of Appeal as to the standard which must be applied.

II.

The Ninth Circuit Has Applied a Standard of Statutory Construction Which Conflicts With Decisions of This Court.

This Court has never before sanctioned the mechanical standard of statutory construction adopted herein by the Ninth Circuit.

In *U.S. v. Ryan*, 350 U.S. 299, 306-307, 76 S.Ct. 400, 405 (1956), this Court first addressed a contention that, by virtue of Section 501(3), a term then used in Title III, Section 302(b), 29 U.S.C. §186(b), was limited to the same definition set forth in Section 2(4), 29 U.S.C. §152(4).

In *Ryan, supra*, the defendant argued that the Section 2(4) definition of the term "representative,"[7] at that time used in Section 302(b), meant exclusive bargaining representative and not individuals. Thus, payments to individuals were not prohibited by Section 302(b).

This Court rejected the defendant's argument first by analyzing the literal meaning of the statute *in toto*, then by

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[7]Prior to the 1959 amendments to the LMRA, Section 302(b) read: "It shall be unlawful for any *representative* . . . to receive . . . money . . . (emphasis added)." In 1959, Congress amended the Section, in part, by substituting the word "person" for "representative." *See* subsection (a)(c). Pub. L. 86-257 (1959).

examining the Congressional purpose and finally by surveying the legislative history of the LMRA. This Court stated: "But further, the provision in the LMRA that 'representative' shall have its NLRA meaning [Section 501(3)] is no more applicable to § 302 than to any other section of the LMRA . . . ." *Id.*, at 350 U.S. 307, 76 S.Ct. 405. *See also Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29, 82 S.Ct. 541, 548 (1962).

This Court applied a similar standard of statutory construction in *Allied Chemical, supra*, at 404 U.S. 169-171, 92 S.Ct. 392-393. There the National Labor Relations Board argued that for purposes of the Board's jurisdiction pursuant to Section 8(a)(5), 29 U.S.C. §158(a)(5), the term "employee" should be given as broad a construction as was given to the term under Section 302(c)(5) in *Blassie, supra*, at 345 F.2d 70. Although this Court noted (*see* n.8 at 404 U.S. 169, 92 S.Ct. 392) that Section 501(3) "provides that the term 'employee' . . . has the same meaning as when used in the National Labor Relations Act," this Court declined to construe the terms *in pari materia*. Analyzing the diverse purposes of the two statutes and rejecting a mechanical construction, this Court concluded that the term "employee" need not be given the same meaning for both statutes: "there is no anomaly in the conclusion that retired workers are 'employees' within § 302(c)(5) . . . but are not 'employees' . . . embraced by the bargaining obligation of § 8(a)(5)." *Allied Chemical, supra*, at 404 U.S. 170, 92 S.Ct. 393.

In short, while this Court, like the Circuit Courts of Appeal, has not yet passed on the merits of the precise question at bar, it has consistently refused to apply the *pro forma* mechanical standard of statutory construction adopted by the Ninth Circuit here when deciding upon significant ques-

tions affecting the national labor policy expressed by Title III. For that reason, the Ninth Circuit's decision conflicts with those of this Court.

III.

The Decision of the Ninth Circuit Involves an Important Question of Federal Labor Law.

Regardless of the merits of the question presented for review, the mechanistic decision of the Ninth Circuit has a potentially devastating impact upon the labor-management trust fund eligibility of other persons currently excluded by definition from Section 2(3). Thus, Section 2(3), by definition, excludes not only independent contractors, but agricultural laborers, supervisors, individuals employed by an employer subject to the Railway Labor Act, 45 U.S.C. 151 *et seq.*, as well as others. Section 2(3) has also been interpreted by this Court to exclude managerial employees, *see NLRB v. Bell Aerospace, Division of Textron, Inc.*, 416 U.S. 267, 289, 94 S.Ct. 1757, 1769 (1974); and as noted above, it excludes retired employees, *Allied Chemical, supra*, at 404 U.S. 168, 92 S.Ct. 392.

Yet, Petitioners estimate that scores and perhaps hundreds of thousands of persons excluded from the definition of the term "employee" in Section 2(3) are currently participating by agreement of the parties in labor-management trust funds established under Section 302(c)(5). While statistics in this regard are not, to our knowledge, available, legal sanction exists for excluded groups (like owner-operators) to be voluntarily included in bargaining units and in collective bargaining agreements which provide for participation of such groups in Section 302(c)(5) trust funds.

Thus, in *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790, 809 n.19, 94 S.Ct. 2737, 2747 n.19 (1974) this Court recognized that

an employer is not prohibited from voluntary collective bargaining with respect to supervisors. In that very case, indeed, it appears that supervisors of the company, both in and out of the bargaining unit, participated in union sponsored group insurance and old-age-benefit plans. *Id.*, at 417 U.S. 792-793, 94 S.Ct. 2738-2739.

The inclusion of supervisors under collective bargaining agreements (and, thereby, in labor-management trust funds) is hardly uncommon. *See e.g., Local 636 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry etc. v. NLRB*, 287 F.2d 354, 362 (D.C. Cir. 1961) (construction industry); *San Francisco-Oakland Mailers Union No. 18 (Northwest Publications, Inc.)*, 172 N.L.R.B. 2173 (1968) (printing trades). Employers have recognized and dealt with unions composed largely or entirely of supervisors. *See e.g., National MEBA, supra*, at 294 F.2d 390 and *Isbrandtsen, supra*, at 256 F.Supp. 68 (maritime industry), and *Directors Guild of America, Inc.*, 198 N.L.R.B. 707 (1972), *enf'd* 494 F.2d 692 (9th Cir. 1974) (motion picture and television directors).

Of course, *Blassie, supra*, at 345 F.2d 68 demonstrates that retired persons may participate in benefits from a Section 302(c)(5) trust fund.

The decision below, while it is confined to independent contractors, potentially affects all persons excluded by definition from NLRB jurisdiction under Section 2(3) because the decision is based on an erroneous rule of law which logically disqualifies not only independent contractors but all others excluded from Section 2(3). Because of the importance of this question of federal labor law, a grant of certiorari is necessary and appropriate.

IV.
Conclusion.

In this term, this Court has already rejected adoption of a "literal reading" of a statute involving fundamental rights under federal labor policy. *See NLRB v. Hendricks County Rural Electric Membership Corporation*, ... U.S. ...., 102 S.Ct. 216, 50 L.W. 4037, 4039 (Nos. 80-885 and 80-1103, October Term, 1981).

Here, the decision of the Ninth Circuit, adopting a similar literal reading, raises a problem of equal importance. Are trustees of labor-management trust funds now required to know and apply jurisdictional standards of the National Labor Relations Board? Are those trustees now required to automatically exclude from participation persons that the parties to a collective bargaining agreement have voluntarily included? Is there anything in the legislative history of the LMRA which supports such a burdensome result?

These troublesome questions are squarely raised here and deserve the attention of this Court. For these reasons, Petitioners respectfully submit that a writ of certiorari should issue.

Respectfully submitted,

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By RALPH M. PHILLIPS,

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Appendix

APPENDIX i.

Memorandum.

United States Court, of Appeals for the Ninth Circuit.

Joint Council of Teamsters No. 42, *et al.*,
Appellants,

v.

Associated General Contractors of California, Inc., *et al.*,
Appellees.

No. 80-5869

D.C. No. CV 79-3325.

Filed: October 1, 1981.

Appeal from the United States District Court for the Central District of California.

Mariana R. Pfaelzer, District Judge, Presiding.

Argued and Submitted August 7, 1981.

Before: ELY and NORRIS, Circuit Judges, and COPPLE,* District Judge.

The issues here involved were thoroughly considered by District Judge Pfaelzer in the court below. Essentially upon the basis of Judge Pfaelzer's Opinion [reported at 520 F. Supp. 3 (C.D. Cal. 1980)] the District Court's judgment is

AFFIRMED.

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*The Honorable William P. Copple, United States District Judge, District of Arizona, sitting by designation.

APPENDIX ii.

Order and Judgment.

United States District Court, Central District of California.

Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*,

Plaintiffs,

v.

Associated General Contractors of California, Inc., *et al.*,

Defendants.

Case No. CV 79-3325 MRP.

The parties' Cross-Motions for Judgment on the Pleadings came on for hearing on December 3, 1979. Having heard oral argument, considered the papers submitted, and taken the matter under submission, the Court determines that defendants' Motion for Judgment on the Pleadings should be granted and plaintiffs' Motion denied.

The Court has jurisdiction over this suit for declaratory judgment under 29 U.S.C. §§ 185(a), 186(e) and 28 U.S.C. § 2201. The plaintiffs seek a determination that owner-operators of trucking equipment used in the building and construction industry are employees under § 302 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186, and that § 302 therefore does not preclude employers who employ the owner-operators from making contributions to plaintiffs' trust fund for their benefit.

The Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and General Teamsters and Food Processing Local No. 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "the Unions") are the plaintiffs in this case. Defendants are the Associated General Contractors of California, Inc. ("AGC"), the Building Industry

Association of California, Inc. ("BIA"), the Engineering Contractors Association, Inc. ("ECA") and the Southern California Contractors Association, Inc. ("SCCA") (hereinafter all defendants referred to as "the Employers").

The AGC, BIA, ECA, and SCCA are voluntary associations of employers in the building and construction industry in Southern California. These associations represent their members in negotiating and administering collective bargaining agreements with the Unions, which in turn represent employees and others in Southern California in the building and construction industry.

Defendants have entered into a Master Labor Agreement ("MLA," effective 1977-80) with the Unions, including within the definition of "employees" not only driver-employees, who operate dump trucks and other construction vehicles owned by defendants, but also owner-operators, who own individual construction vehicles used to perform hauling services for the Employers. In compliance with the MLA, the Employers have been making contributions on behalf of the employees and the covered owner-operators to a trust fund. The trust fund, established pursuant to § 302(c)(5), 29 U.S.C. § 186(c)(5), is intended to provide benefits such as hospital care, dental and medical insurance, vacation benefits and training programs to the Employers' employees and their families.

The legality of the Employers' contributions made on behalf of the owner-operators covered by the MLA is the fundamental issue in the present litigation. The Employers have taken the position that the owner-operators were not properly classified as employees under § 302 of the LMRA and that, consequently, contributions legally cannot be made to the trust fund. The Employer associations therefore have announced their intention of advising their members to cease making contributions on behalf of owner-operators. The

Unions have contended that the owner-operators were properly classified as employees and thus contributions on their behalf were required under the MLA. The resolution of the dispute turns on whether the definition of employee in § 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(3), applies to the LMRA.

In *Associated General Contractors v. NLRB*, 564 F.2d 271 (9th Cir. 1977), the major parties herein litigated the issue of whether owner-operators were employees under § 2(3) of the NLRA. In that case, the Ninth Circuit determined that owner-operators are independent contractors and are therefore expressly excluded as employees under the NLRA. Thus, if the definition of "employee" under § 2(3) of the NLRA, as clarified by *Associated General*, is equally applicable in the context of the LMRA, the owner-operators are not employees under § 302 of the LMRA. Based on this analysis, contributions to plaintiffs' trust funds by defendant Employers on behalf of owner-operators would be illegal under § 302.

The Court concludes that the statutory language mandates this result. Section 501(c) of the LMRA, 29 U.S.C. § 142, provides that, when used in that Act, the term "employee" shall have the same meaning as when used in the NLRA. Whatever the desirability of extending these benefits to the owner-operators may be, it is clear that § 501(c) construed in light of *Associated General, supra,* requires this Court to hold that owner-operators are not employees under § 302 of the LMRA. Thus, owner-operators are precluded from being beneficiaries of the employer-financed trust fund, and contributions on their behalf to plaintiffs' trust funds are illegal.

The cases cited by plaintiff, *Blassie v. Kroger Co.*, 345 F.2d 58 (8th Cir. 1965), and *Reiherzer v. Shannon*, 581 F.2d 1266, 1276 (7th Cir. 1978), do not preclude the ap-

plication of the same definition of "employee" in both the NLRA and the LMRA. As the Supreme Court has indicated in *Allied Chemical & Alkali Workers of America Local 1 v. Pittsburgh Plate Glass Co., Chemical Div.*, 404 U.S. 157, 169-70 (1971), the *Blassie* opinion, in its treatment of retired employees, does not define "employee" under § 302 of the LMRA differently from the way in which the term is defined under § 2(3) of the NLRA. The apparent increase in scope of the "employee" classification resulted from the *Blassie* court's determination of employee status as of the time of the employer's payments to the trust fund, rather than as of the time of the trust's payment of benefits to the employee. The focus on the timing of the payments to the employees did not effect any modification of the definition of the term "employee." The categories of workers subsumed by the term "employee" remain unchanged.

The Court having concluded that owner-operators are not employees within the meaning of § 302 of the LMRA and that contributions by Employers to plaintiffs' trust fund on their behalf are illegal,

IT IS HEREBY ORDERED that defendants' Motion for Judgment on the Pleadings is granted and plaintiffs' Motion for Judgment on the Pleadings is denied. Further,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in defendants' favor.

DATED: October 22, 1980.

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX iii.

Pertinent Statutory Provisions.

29 U.S.C. §152:

When used in this subchapter —

. . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

• • •

29 U.S.C. §186:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer

to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income

or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and their are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying

costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

• • •

142 U.S.C. §142:

When used in this chapter—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agree-

ment) and any concerted slowdown or other concerted interruption of operations by employees.

(3) The terms ''commerce'', ''labor disputes'', ''employer'', ''employee'', ''labor organization'', ''representative'', ''person'', and ''supervisor'' shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter.

APPENDIX iv.

Pertinent Provisions of the Collective Bargaining Agreement.

ARTICLE I

General Provisions

A. Definitions

....

5. The term "Employee(s)," as used herein, shall refer to the employed person, or persons, working in the basic craft jurisdictions covered by this Agreement, and Owner-Operators as defined in the Teamsters and Operating Engineers Section of this Agreement that define Owner-Operator.

....

ARTICLE XIII

Owner-Operator

1300. Owner-Operator is an individual that holds legal or registered title to a motor vehicle or to the power equipment unit thereof in his name and who personally drives such vehicle or unit in the performance of work covered by this Agreement.

....

ARTICLE XIV

Trust Fund and Delinquencies

....

1409. The Employer shall make contributions into the appropriate Trust Funds for all employees covered by this Agreement for all hours of employment (worked or paid) of such employees, regardless of whether all such hours are worked in work covered by this Agreement.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1431

IN THE

Supreme Court of the United States

October Term, 1981

JOINT COUNCIL OF TEAMSTERS NO. 42, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and GENERAL TEAMSTERS AND FOOD PROCESSORS LOCAL NO. 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.; BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING CONTRACTORS ASSOCIATION, INC.; and SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Suite 2800,
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Question Presented.

WHETHER AN EMPLOYER MAY LAWFULLY MAKE CONTRIBUTIONS INTO EMPLOYEE BENEFIT PLANS ESTABLISHED PURSUANT TO SECTION 302(c)(5) OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 AS AMENDED (29 U.S.C. 186(c)(5)) ON BEHALF OF PERSONS WHO ARE INDEPENDENT CONTRACTORS.

Parties to the Proceeding.

The following are parties to this proceeding:

(1) Joint Council of Teamsters No. 42, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and General Teamsters and Food Processors, Local No. 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(2) Associated General Contractors of California, Inc., Building Industry Association of California, Inc., Engineering Contractors Association and Southern California Contractors Association. Each of these parties is a corporation. However, none of these corporations have any parent, subsidiary or affiliated corporations.

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No. 81-1431

IN THE

Supreme Court of the United States

October Term, 1981

JOINT COUNCIL OF TEAMSTERS NO. 42, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and GENERAL TEAMSTERS AND FOOD PROCESSORS LOCAL NO. 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.; BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING CONTRACTORS ASSOCIATION, INC.; and SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, Associated General Contractors of California, Inc., The Building Industry Association of California, Inc., The Engineering Contractors Association, Inc., and Southern California Contractors Association, Inc., pray that the Petition for Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit be denied.

STATUTORY PROVISIONS INVOLVED.

Section 302 of the Labor-Management Relations Act (29 U.S.C. 185) (June 23, 1947, ch. 120, Title III, §302, 61 Stat. 157) (29 U.S.C. §186) in pertinent part provides:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payments, loan, or delivery of any

money or other thing of value prohibited by subsection (a) of this section.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization; Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the *employees* of such employer, and their families and dependents (or of such *employees*, families, and dependents jointly with the *employees* of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for

the purpose of paying, either from principal or income or both, for the benefit of *employees*, their families and dependents, for medical or hospital care, pensions on retirement or death of *employees*, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and *employees* and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of *employees* may agree upon and in the event the employer and *employee* groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for *employees* are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for

the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds;. . . . (italics added)

Section 501[1] of the Labor-Management Relations Act (29 U.S.C. §142(3)) in pertinent part provides as follows:

"Section 501. when used in this Act . . . (3) the terms . . . 'employer', 'employee' . . . shall have the same meaning as when used in the National Labor Relations Act [of 1935] as amended by this Act."

Section 2(3) of the Labor-Management Relations Act[2] (29 U.S.C. §152(3)) in pertinent part provides:

When used in this Act — (3) the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but *shall not include* any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or *any individual having the status of an independent contractor*, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. (Italics added)

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[1]June 23, 1947, ch. 120, Title V, §501, 61 Stat. 161.
[2]June 23, 1947, ch. 120, Title I, §101, 61 Stat. 136.

STATEMENT OF CASE.

A. Statement of Facts.

In addition to the facts set forth by Petitioners, the Respondent Employer Associations state the following:

1. The facts relevant to the status of owner-operators are fully set forth in the Opinion of the United States Court of Appeals for the Ninth Circuit in the case of *Associated General Contractors of California, Inc., et al. v. NLRB*, 564 F.2d 271(1977). This Opinion is set forth in Appendix A for the convenience of the Court.

2. The Trust Funds to which the employers are required to make payments include the Western Conference of Teamsters Pension Trust which provides pension benefits.

B. Proceedings Below.

The courts below held that it would be unlawful under Section 302 of the Act (29 U.S.C. §186) for the employers to make contributions on behalf of dump truck owner-operators inasmuch as these persons are independent contractors and not employees within the meaning of the Act. The courts below reached this conclusion reasoning: (1) owner-operators are self-employed, independent contractors. Associated General Contractors, *supra*; (2) Section 2(3) of the Act defines the term employee to exclude independent contractors; (3) Section 501(3) of the Act states that the term employee shall have the same meaning throughout the Act; therefore, Section 302 of the Act only permits employer payments on behalf of "employees" and prohibits payments on behalf of independent contractors.

ARGUMENT.

I.

There Is No Conflict Among the Circuit Courts on the Issue Presented in This Case.

No court has ever held that an employer may lawfully make contributions to trust funds on behalf of self-employed, independent contractors. Not one of the cases cited by Petitioners deals with the issue; each case deals with supervisors or alleged supervisors in an entirely different factual context.[3]

Of particular interest is the case of *Blassie v. The Kroger Co.*, 345 F.2d 58 (8th Cir. 1965) cited by Petitioners[4] for the proposition that union officers, as supervisors, may be participants in a trust established pursuant to Section 302(c)(5) of the Act. The *Blassie* court, held that Section 302 did not bar a union's officers from participation even though they possessed some managerial duties. The court deemed it "natural and not unexpected" for a union's employees to enjoy the benefits of a trust fund in like manner with the regular employees of the food stores.[5] Of most significance, is the clear holding by the *Blassie* court that persons who are not and who have never been common law employees of the contributing employers are to be excluded from participation in the trust fund.[6] Thus, a "mechanical" (to use the words of Petitioners) approach would exclude owner-operators who are not and who have never been common law employees of the contractors. Had it been presented

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[3]Petitioner's Brief pages 9 through 14.

[4]Petitioner's Brief page 11.

[5]*Id* p. 74. Moreover, in *Blassie* the collective bargaining agreement did not require the food store employers to contribute to the trust on behalf of store managers or other statutory supervisors.

[6]*Id*. p. 71.

with the independent contractor issue the *Blassie* court would surely have so held.

II.

The Opinion Below Is Consistent With *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) and Other Cases From the Court That Have Endeavored to Consistently Construe the Civil and Unfair Labor Practice Provisions of the Act.

Contrary to the assertions of Petitioners, the case *of Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) does not indicate that the word "employee" is to have two different meanings i.e., one under the unfair labor practice sections and another under the civil suit sections of the same Act. Indeed, the Court in *Allied Chemical*, *id.*, impliedly agreed with the NLRB which had held that the term "employee" as used in Section 302, has the same meaning as the term "employee" as defined in Section 2(3).

This Court has historically approached the Act in the same manner adopted by the Ninth Circuit here, viz. consistency of interpretation of all provisions of the Act, regardless of forum. This is essential where an administrative agency and the courts have dual jurisdiction in interpreting the same basic statute. The Court has construed Titles I and III[7] of the 1947 Act in like manner. Thus, in *Howard Johnson Company Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 262 (1974), the Court applied the legal principles developed in an unfair labor practice case[8] to a suit

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[7]Title I deals generally with unfair labor practices and representation elections; Title III deals with suits for damages and employer payments to labor unions.

[8]*NLRB v. Burns International Security Services*, 406 U.S. 272(1971).

brought under Section 301 (29 U.S.C. 185(a)) of the Act; and in an unfair labor practice case has pointedly noted for the lower courts its position on the civil enforcement under Section 301 of certain kinds of collective bargaining agreements. *NLRB v. Local Union No. 103, International Association (Higdon Contracting)*, 434 U.S. 335, 351 (1978). Again, this term the Court in *Kaiser Steel Corporation v. Mullins et al.* .... U.S. ...., 50 U.S.L.W. 4152, 4155, (1982) held that federal courts in civil actions must sometimes construe the "hot cargo" provisions of the Act which are found in Title I. The Court further implied that the district court should apply the law developed in an unfair labor practice case viz. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967) to the defendants' assertion of illegality.[9]

III.

The Narrow Holding of the Ninth Circuit Is of Limited Consequence.

In the view of the Employer Associations, this case arose because at mid-term of the collective bargaining agreement the parties received a definitive ruling that these particular owner-operators of dump trucks are independent contractors and not employees. An unusual, if not unique circumstance.

Petitioners vainly argue that some court, some time in the future will seize upon this case as a means of depriving supervisors such as construction foremen and television directors of their fringe benefits. They invite such speculation but at the same time concede that the decision below is confined to independent contractors.[10]

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[9]*Kaiser Steel v. Mullins*, ... U.S. ...., 50 U.S.L.W. at 4155.

[10]Petitioner's Brief page 17.

Nearly 25 years have passed since the Act was passed, with limitless opportunities for litigation to arise. Yet, Petitioners have cited no case involving contributions by an employer on behalf of independent contractors. The Ninth Circuit's holding is apparently only important to these parties.

Conclusion.

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

JOHN H. STEPHENS,
Attorney for Respondents, Associated General Contractors of California, Inc.; Building Industry of California, Inc.; Engineering Contractors Association, Inc.; Southern California Contractors Association, Inc.

Appendix

APPENDIX A.

Judgment.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., Building Industry Association of California, Inc., and Engineering and Grading Contractors Association, Inc., Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent and Joint Council of Teamsters No. 42, General Teamsters and Food Processing Union, Local No. 87, Sales Drivers & Dairy Employees Union, Local No. 166, Chauffeurs, Teamsters & Helpers Union, Local No. 186, General Truck Drivers Union, Local No. 235, Teamsters & Warehousemen Union, Local No. 381, Building Material & Dump Truck Drivers Union, Local No. 420, General Truck Drivers, Chauffeurs & Helpers Union, Local No. 898, and General Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 982, all affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Associated Independent Owner-Operators, Inc., and California Dump Truck Owners Association, Intervenors.

TEAMSTERS LOCAL UNION NOS. 137, 150, 216, 287, 291, 386, 431, 439, 490, 315, 624, 684, 890, 912 and 980, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Heavy, Highway, Building and Construction Teamsters Committee of Northern California, Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent. Nos. 75-3157, 75-3370 and 75-3580.

United States Court of Appeals, Ninth Circuit.

Oct. 11, 1977. Rehearing and Rehearing En Banc Denied Dec. 30, 1977.

Petition for Review and Cross-Application for Enforcement of a Decision of the National Labor Relations Board.

Before BARNES and SNEED, Circuit Judges, and WONG,* District Judge.

SNEED, Circuit Judge:

Associated General Contractors of California, Inc. (AGC), Building Industry Association of California, Inc. (BIA), and Engineering and Grading Contractors Association, Inc. (EGCA) (jointly referred to as "Employers"), Teamsters Local Union No. 137, et al. (Northern California Unions), and the Associated Independent Owner-Operators, Inc. (AIOO), petition this court under section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f) (Act) to review a decision and order of the National Labor Relations Board (Board). The Joint Council of Teamsters No. 42, et al., (Southern California Unions) and the California Dump Truck Owners Association (CDTOA) have intervened, and the Board has filed a cross-application for enforcement. In the decision and order, the Board found that the Employers had engaged in unfair labor practices, within the meaning of sections 8(a)(1) and (2) of the Act 29 U.S.C. §§ 158(a)(1) and (2),[1] by entering into, maintaining and enforcing con-

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* Honorable Dick Yin Wong, United States District Judge for the District of Hawaii, sitting by designation.

[1]Sections 8(a)(1) and (2) provide that

(a) It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 157 of this title;

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

tracts with the Unions at a time when a real question concerning the representation of the employees existed. It is reported at 220 N.L.R.B. 93.

I. *Facts.*

The AGC, BIA and EGCA are voluntary associations of employers engaged in the building and construction industry. They represent their employer-members in negotiating and administering collective bargaining agreements; all three represent employers in their negotiations with the Southern California Unions and the AGC and EGCA represent employers in negotiations with the Northern California Unions.

The Employers use dump trucks and other vehicles in the course of their construction businesses. These vehicles are operated either by driver-employees, who are employed in the traditional sense and who are represented by the Union,[2] or owner-operators, who are represented by the AIOO and the CDTOA. The fundamental issue around which this litigation swirls is whether these owner-operators should be classified as self-employed independent contractors or employees of the Employers.[3]

Prior to 1971, the Master Labor Agreement (MLA) negotiated by the Employers and the Unions did not cover owner-operators. In 1970, the Unions obtained a modification of the MLA, which was executed in January, 1971, that would subject the owner-operators to Union control by

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[2]The status of these driver-employees is not at issue, nor is their representation by the Unions questioned.

[3]Neither the parties nor this litigation is a newcomer to this Court. The AIOO previously challenged in district court the Board's finding with respect to the employment status of the owner-operators and attempted to have the election enjoined. The district court dismissed the case for lack of jurisdiction and we affirmed. *Bays v. Miller*, 524 F.2d 631 (9th Cir. 1975).

expanding the coverage of the MLA to include owner-operators as employees. This modification prompted three owner-operators to file decertification petitions with the Board on February 26, 1971, seeking elections in their respective bargaining units and decertification of the incumbent Unions as sole bargaining representatives of construction industry employees.

The Board held hearings on these decertification petitions in which the parties presented conflicting contentions as to the status of the owner-operators. On January 17, 1973, the Board rendered its decision in which it held that the owner-operators were "employees" within the meaning of the Act, that they were entitled to participate in an election, and that a question concerning the representation of the employees existed. 201 N.L.R.B. 311. The Board also remanded the cases to the Regional Director to determine the scope of the bargaining units and the eligibility of the employees. After hearings on these issues, on March 5, 1974 the Board issued a Supplemental Decision and Direction of Election, which held, *inter alia* that owner-operators were properly included with driver-employees in the same bargaining unit and which directed elections by mail in the separate Northern and Southern California units. 209 N.L.R.B. Nos. 61, 62.

In July 1974, in the midst of election proceedings in the northern and southern regions, the Employers entered into new collective bargaining agreements, which covered the owner-operators, with the Unions. Almost immediately thereafter, the owner-operator associations, the AIOO and the CDTOA, filed unfair labor practice charges against the Employers. The Board suspended further processing of the

elections pending the determination of the unfair labor practice charges.[4]

The Board consolidated these charges and held hearings in January, 1975. In September, 1975 the Board rendered the decision now on appeal, finding violations of sections 8(a)(1) and (2) and ordering, *inter alia*, the Employers to cease and desist from further bargaining with the Unions and from enforcing the 1974 contract until the Unions provided their majority representation status in a Board conducted election.

II. *The Contentions.*

The parties bring several issues to this court for review. The first, not surprisingly, deals with the problem of whether the owner-operators are independent contractors or employees. This issue, however, divides itself into two parts; first, whether this court may even reach the issue at this stage and second, whether the Board properly classified the owner-operators as employees. The Employers and the owner-operators here join forces and contend that this court may consider the issue in its review of the unfair labor practice charge and that this court should reverse the Board's finding as to the status of the owner-operators. Inasmuch as this finding underlies the unfair labor practice charge, the Employers and owner-operators seek a remand of the unfair labor charge to the Board. On the other hand, the Board and the Unions insist that this court may not reach the issue because the finding was made in the course of a representation investigation under section 9(c), 29 U.S.C. § 159(c).

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[4]In the southern region, the Board had prepared eligibility lists and had mailed the ballots to the eligible voters. In the northern region, eligibility lists were being prepared. Upon the filing of the unfair labor practice charges, the Board impounded all the votes it had received and discontinued any further proceedings in the elections.

The second issue presented by the parties is whether, assuming the owner-operators were properly classified as employees, the evidence was sufficient to support the Board's finding that a real question existed concerning the representation of the majority of the employees. On this issue, the owner-operators align themselves with the Board in support of the Board's finding, whereas the Employers and the Unions stand shoulder to shoulder and argue that the evidence did not support such a finding.

The AIOO also complains of the Board's remedy for the unfair labor practice. It argues that its members are entitled to recover certain losses incurred as a result of the Employers' entering into collective bargaining agreements with the Unions. In addition, it contends that the Board should not have permitted the Employers to continue to recognize the Unions as representatives of the employees.

For the reasons hereafter stated, we hold that appellate review of the issue of the employment status of the owner-operators is proper under the circumstances of this case and we conclude that under the facts before us, the owner-operators appropriately should be classified as independent contractors, not employees. This holding makes it unnecessary to reach the remaining issues. We deny enforcement of the Board's order and remand the cases to the Board for further consideration of the unfair labor practice charges in the light of this opinion.

III. *Availability of Appellate Review.*

The parties focus their respective arguments as to whether this court may review the Board's finding with respect to the employment status of the owner-operators on the proper interpretation of section 9(d) of the Act, 29 U.S.C. § 159(d), which provides:

> (d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The Board contends that this section permits review of rulings made by the Board in representation proceedings only after the Board has (1) held an election, (2) certified the results and (3) ordered the employer to do something based on these election results. It relies heavily on the Supreme Court's decision in *Boire v. Greyhound Corp.*, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964), where the Court observed "the purpose of § 9(d) was to provide 'for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.' " *Id.* at 478-79, 84 S.Ct. at 897-98. Inasmuch as the three prerequisites to appeal have not been satisfied, the Board argues, this court may not review the Board's finding. The owner-operators, however, insist on what they consider to be a more practical application of section 9(d). They contend that because the record of the representation case is included in the record of this unfair labor practice case[5] and was the basis for the finding that an unfair labor practice had been committed,

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[5]The parties introduced the record of the representation case into evidence at the hearing below, and it is a part of the record before us.

section (d) is satisifed and this court may consider the matter. While conceding that findings in representation proceedings generally are reviewable in the context of a review of an unfair labor charge based on a refusal to bargain with a certified bargaining representation under section 8(a)(5), 29 U.S.C. § 158(a)(5), the owner-operators argue that such findings are also reviewable in the course of a review of other unfair labor practice charges, such as the sections 8(a)(1) and (2) charges in these cases.

We agree with the Board in that section 9(d) in itself does not allow us to review this ruling of the Board. Nonetheless, we conclude that we may review the Board's finding, under section 10(f), 29 U.S.C. § 160(f), in conjunction with our review of the unfair labor practice charges now before us, and that this review is not precluded by section 9(d).

The legislative history of section 9(d) supports our reasoning. Prior to the enactment of section 9(d) in 1935, direct review of election orders prior to the election was permitted. This allowed employers to engage in dilatory tactics aimed at weakening the position of the unions, whose influence tended to wane as the election was postponed pending court review. *See* 79 Cong. Rec. 7569 (1935) (remarks of Sen. Wagner). To remedy this defect, Congress passed section 9(d). By its enactment, Congress intended to abolish direct review of the representation findings, replacing it with a method of indirect review whereby an employer faced with a Board order relating to an unfair labor practice based on the results of an election could obtain review of the underlying representation proceeding indirectly through the review of the unfair labor practice decision. It is clear that Congress did not contemplate direct review of representation proceedings prior to an election. S.Rep. No. 573-74, 74th Cong., 1st Sess., 14 (1935). See *Boire v. Greyhound Corp.*, *supra*; *A. F. of L. v. N.L.R.B.*, 308 U.S. 401, 60 S.Ct.

300, 84 L.Ed. 347 (1940). Instead, Congress struck a balance which would prevent undue interference with the election process with its attendant detrimental effect on labor relations but which also would provide for eventual review of the representation proceedings. *See* H.R.Rep. No. 969, 74th Cong., 1st Sess., 5, 20-21 (1935) H.R.Rep. No. 972, 74th Cong., 1st Sess., 5-6, 20-21 (1935).

Congress reaffirmed its belief in this balance during the passage of the Labor Management Relations Act of 1947. The House proposed an amendment to section 10(f) which would allow "any person aggrieved by a final order of the Board [including an order of certification under section 9]" to appeal. This amendment sought to cure the unfairness of the present system, in which many of the parties are without an effective avenue of appeal, by giving any aggrieved person the right to a direct appeal from the election order.[6] The amendment was rejected because it would permit the same dilatory tactics used prior to 1935. 93 Cong.Rec. 644 (1947) (remarks of Sen. Taft).

In sum, the intended thrust of section 9(d) was aimed at the prohibition of *direct* review of certification orders; *indirect* review at some point was clearly envisioned. Taken in this context, comments such as "Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election," S.Rep. No. 573, 74th Cong., 1st Sess., 14 (1935) must be viewed as merely restating the intention of Congress to deny *direct* review of certification orders. It does not follow that indirect review

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[6]This [the current] procedure is unfair to everyone; the Union that wins, which frequently must wait for months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be; the employees, who have no appeal; and the employer, for whom an appeal involves great risks.

H.R. No. 245, 80th Cong., 1st Sess., 43 (1947).

of representation proceedings prior to an election is prohibited.

N.L.R.B. v. Falk Corp., 308 U.S. 453, 69 S.Ct. 307, 84 L.Ed.2d 396 (1940), is not to the contrary. In that case, the Board, in a consolidated proceeding, (1) had found that the employer had committed an unfair labor practice by fostering and dominating a company union and (2) had directed an election to be held without the participation of the company union. The court of appeals granted enforcement of the Board's order to cease dominating and to disestablish the company union. However, on its own volition, it ordered that the employees in a future election should be free to choose the company union. The Supreme Court primarily was concerned with only the latter holding.

The Court held that section 9(d) did not authorize "such anticipatory judicial control of election methods." Inasmuch as none of the Board's orders was " 'based in whole or in part upon facts certified' as the result of an election," *N.L.R.B. v. Falk Corp.*, 308 U.S. at 459, 60 S.Ct. at 311, the court of appeals was powerless to modify the election proceeding. The Court limited the power of the court of appeals under section 9(d) to review of Board orders based on an actual certification of a bargaining representative.

> The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be no certification of a bargaining representative and no Board order—based on a certification, has been or can be made, so as to invoke the court's powers under 9(d).

N.L.R.B. v. Falk Corp., 308 U.S., at 459, 60 S.Ct. at 311.

Under the Court's reasoning (contrary to the owner-operators contention at oral argument) "facts certified" are limited to those actually certified after an election, *viz.*, the

certification of the bargaining unit, bargaining representative, etc., and do not include any facts which the Board may "certify" as part of the record. The Court spoke unequivocally when it said:

> There can be no court review under 9(d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.
>
> Since this employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9(d).

Id.

Although section 9(d) provides no authority to consider the owner-operator issue, it also does not preclude reaching the issue in the context of the independent unfair labor practice under section 10(f). The basis for this conclusion resides in *Falk*. The pivotal finding there was that the employer fostered and dominated the company union. This finding provided the basis for the Board's unfair labor practice holding, which holding was reviewed by the court of appeals in the course of deciding that the Board's order to cease dominating and to disestablish the company union should be enforced. The Supreme Court recognized that the court of appeals had jurisdiction to review the Board's unfair labor practice holding and in the course of that review, to determine whether the Board had correctly found that the employer fostered and dominated the company union. Had it not so recognized jurisdiction it would have pointed out that the circuit court's enforcement of the unfair labor practice order was a *brutum fulmen*. No such indication was given. Moreover, nothing in *Falk* indicates that the circuit court's power was limited to enforcement only.

Here, the pivotal finding by the Board was that owner-operators are employees. This finding was the basis for conducting an election in which the bargaining unit included

owner-operators. It also was the basis for the unfair labor practice of bargaining with a union when a question concerning representation exists. In reviewing the Board's unfair labor practice holding under the authority of section 10(f) we must determine whether the Board correctly held the owner-operators to be employees. In doing so we are merely doing what the court of appeals in *Falk* did when it reviewed the facts and enforced the Board's order to cease dominating and to disestablish the company union.[7] Our jurisdiction, however, is limited to the unfair labor practice proceedings. Under *Falk*, we have no jurisdiction to review any order in connection with the representation proceedings.[8]

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[7]The case before us admittedly is distinguishable from *Falk* in terms of the chronology of events. In *Falk*, the two proceedings were held simultaneously, whereas in our case the representation case preceded the unfair labor case. This is a distinction without a difference. To illustrate, assume that in *Falk*, the representation case was heard first, and the Board found that the employer had fostered and dominated the company union and therefore the Board would not place the company union's name on the ballot. Then, because of this finding, an unfair labor practice charge was heard, relying mainly on the earlier finding in the representation proceeding. To allow this procedural difference to deprive this court of the power to reach the controlling issue in this case places form over substance.

[8]To illustrate further, we turn to the Fourth Circuit decision in *E. I. Dupont De Nemours & Co. v. N.L.R.B.*, 116 F.2d 388 (4th Cir. 1940), cert. den. 313 U.S. 571, 61 S.Ct. 959, 85 L.Ed. 1529 (1941), which relies heavily on *Falk*. As in *Falk*, the Board, in consolidated unfair labor practice and representation proceedings, had found that the employer had committed an unfair labor practice by dominating a company union and therefore the Board excluded the company union from the ballot. The court of appeals reversed the Board on the unfair labor practice issue, finding that the employer had not interfered with the formation or operation of the company union. Under *Falk*, however, it held that it could not review the finding as it related to the representation proceeding and consequently could not reverse the Board decision to exclude the company union from the ballot. Similarly, we may not reverse the Board decision in the representation proceeding with respect to the inclusion of the owner-operators in the bargaining unit on the basis of our decision herein. Nevertheless, we may reverse the Board with respect to the owner-operator question as it relates to the unfair labor practice charges now before us.

We do note one other difference. In the instant case, it was the employers' action taken after the Board's finding that precipitated the unfair labor practice charge. In *Falk*, the employer's actions preceded both the representation proceeding and the unfair labor practice proceeding. This difference should not change the result because it is not relevant to the issue before us, to wit, whether this court may consider a finding made in a representation proceeding in the course of its review of an unfair labor practice charge when the representation proceeding is incorporated into the unfair labor practice proceeding.

Holding as we have that in the context of the unfair labor practice charge we may consider the issue of whether the owner-operators are properly considered employees or independent contractors, we now turn to the merits of this problem.

IV. *Reversal of the Board's Finding.*

The facts relating to the independent contractor-employee controversy are not in question. We need only determine (1) whether the Board employed the correct legal standard in deciding this question and (2) if so, was this legal standard properly applied.

For the purpose of section 2(3) of the Act, 29 U.S.C. § 152(3), the term "employee" does not include "any individual having the status of an independent contractor." In distinguishing between the two, both the Board and the courts must apply general agency principles, *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968), such as those found in the *Restatement (Second) of Agency* § 220(2) (1957). *Associated Independent Owner-Operators, Inc. v. N.L.R.B.*, 407 F.2d 1383 (9 Cir. 1969). Of the considerations employed in reaching a decision under general agency law, the deter-

mination of who has the right to control and direct the work is foremost. *SIDA of Hawaii, Inc. v. N.L.R.B.*, 512 F.2d 354 (9th Cir. 1975); *Associated Independent Owner-Operators, Inc. v. N.L.K.B., supra*. It must be tempered, however, by other considerations relevant to the relationship in its entirety. *N.L.R.B. v. United Insurance Co., supra*. Although the Board applied this "right-of-control" test, we disagree with its application of the test and its apparent failure to give sufficient weight to other indicia of independent contractor status.

Yet simple disagreement with the Board does not mandate reversal. We may not reverse the Board simply because we might have decided the case differently were it tried before us *de novo, N.L.R.B. v. United Insurance Co., supra*, nor may we reverse if the board has chosen between two fairly conflicting views of the issue. *N.L.R.B. v. United Insurance Co., supra; SIDA of Hawaii, Inc. v. N.L.R.B., supra; Associated Independent Owner-Operators, Inc. v. N.L.R.B., supra*. On the other hand, if the Board decision that the owner-operators are employees lacks substantial support in the record considered as a whole, we must reverse. Inasmuch as the determination of this issue will depend on the particular facts of the case, we shall first describe the factual setting before us.[9]

The owner-operators own and operate dump trucks and perform hauling services for contractors. They deal either directly with the contractor or through an overlying carrier, who contracts with the contractor to provide hauling services and in turn subcontracts this work to the owner-operators for a fee of 5% of the minimum tariff for the work. An owner-operator generally will have such subcontractual, or

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[9]These facts are derived from the Board's decision in the underlying representation case, reported at 201 NLRB 311.

subhaul, agreements with various overlying carriers; conversely, an overlying carrier will have subhaul agreements with various owner-operators. The overlying carriers do not supervise in any significant fashion the work of the owner-operators. Rejection of referrals from overlying carriers is common; an owner-operator often will turn down work he believes is too dangerous, unprofitable or that simply does not fit into his schedule.

The relationship between an owner-operator and a contractor generally is short-lived. An owner-operator may work for as many as 100 contractors in any given year, and sometimes will work for two different contractors during the course of one work day.

The California Public Utilities Commission (PUC) establishes the minimum tariff, which includes compensation for both labor and equipment. Owner-operators are free to negotiate for higher rates; the minimum tariff operates as a floor below which the rates may not fall. Owner-operators are usually paid by the hour, although sometimes their pay is based on mileage and tonnage rates. Unlike employee-drivers, who are paid on an hourly basis from the time they are told to report to work until the work day is finished, regardless of whether the equipment is in operation throughout that period, owner-operators are not paid for the time their equipment is inactive. Moreover, the contractors do not deduct state and federal income tax, social security, or disability insurance from the owner-operators' wages. The owner-operator keeps track of his own time and presents a bill for his services to the contractor or overlying carrier. This is then compared against the records kept by the contractor or overlying carrier to prevent padding of the bill.

Under the regulations of the PUC, the owner-operators must obtain a permit issued by the PUC, be bonded, and carry sufficient liability insurance. In addition, owner-

operators are responsible for any traffic citations for overloading and spillage.

An owner-operator bears the entire cost of his enterprise. This usually includes his trucking equipment ($15,000 to $20,000), a service pick-up ($1,000 to $4,000), tools ($500 to $1,500), insurance premiums ($500 to $3,500), and office supplies, including for example, stationery, invoices, a typewriter and a calculating machine. In addition, he must pay all maintenance and operational expenses.

An owner-operator may hire a driver to operate his equipment, in which case he pays the driver an hourly wage and makes the standard deductions from the driver's pay. He may also subcontract the work to another owner-operator. In either case, he need not first receive permission for such substitution from, nor even report the substitution to, the contractor. If he hires a driver, this driver is under the exclusive control of the owner-operator.

At the jobsite, the owner-operators observe the same starting time, quitting time and lunch break as do employee-drivers. In most cases, the contractors direct the owner-operators where to load and to dump the materials and designate the routes to be taken. Contractors may have personnel, known as "load checkers," who oversee the performance of the owner-operators. Contractors also often have "spotters" who tell the owner-operators where to dump the material. On occasion, contractors take disciplinary actions in the form of reprimands or docking pay for an owner-operator's poor performance.

In determining that the owner-operators are employees, the Board seized on several facts relating to the owner-operators' performance of their work at the jobsite and concluded that these facts indicated that the contractors had the right to control the manner and means by which the desired

result was accomplished and that the relationship between the parties was therefore that of employer-employee. In so concluding, the Board, although recognizing the distinction between the right to control the manner and means and the right to control only the result, failed to draw this distinction properly. Moreover, the factors relied upon by the Board are not persuasive evidence of an employer-employee relationship.

The contractors' control of the loading and dumping sites and instructions to the owner-operators as to where to pick up and dump this material demonstrates the contractor's right to control the result of the work, not the manner or means of doing the work. Such instructions have little to do with the actual operation of the equipment, *viz.* the manner in which material is loaded, unloaded, and transported. See *Associated Industrial Owner-Operators, Inc. v. N.L.R.B., supra*. Nor does designation of the routes to be taken necessarily indicate that the contractors controlled the manner and means of accomplishing the desired result. Inasmuch as the owner-operators are paid by either the hour or by the mile, it certainly is in the contractors' best interest not to permit owner-operators to take circuitous routes to and from the jobsite. Control of this facet of the business merely prevents padding of the ultimate cost. In the same vein, neither the presence of load checkers, who make certain that the dump trucks do not take side trips, nor spotters, who direct the owner-operators where to dump the material, deprives the owner-operators of their independent status. The existence of the load checkers is simply a by-product of the method of payment. The spotters perform a function which involves primarily the final result of the owner-operator's services.

The Board also pointed to the fact that contractors reprimand owner-operators for "standing around and talking,

for dumping at a site not designated by the contractor, and for taking excessively long lunch breaks'' as an indication for the contractors' control. Clearly the designation of a dumping site is a part of the desired result, which is within the sphere of the contractors' control is a contractor-independent contractor relationship. *Associated Independent Owner-Operators v. N.L.R.B., supra.* As for reprimands for loafing and taking excessively long lunch breaks, these are to be expected from a contractor who wishes to complete a job on time. Such reprimands are not examples of interference with the manner and means by which an owner-operator loads his truck, transports material to a dump site, and unloads his truck.

Finally, the Board notes that the owner-operators are required to observe the same starting and quitting times and lunch breaks as the rest of the employees. Again, this is a necessary requirement by virtue of the need for cooperation among the various workmen at a construction site. Loaders load the dump trucks; the owner-operators must coordinate their work with these loaders. Such coordination would be more difficult if varying lunch hours were observed. We accorded the insignificant factor of prescribed working hours little weight in *Associated Independent Owner-Operators v. N.L.R.B., supra*, and do so again here.

Looking at the relationship in its entirety, it becomes even clearer that the owner-operators are independent contractors. Each operates an independent business of his own, see *Restatement, supra*, § 220(2)(b), in which the contractors exercise no control. See *Joint Council of Teamsters No. 42 v. N.L.R.B.*, 146 U.S.App.D.C. 275, 282, 450 F.2d 1322, 1329 (1971) (MacKinnon, J., dissenting). Each is a skilled operator. *Associated Independent Owner-Operators v. N.L.R.B., supra; Restatement, supra*, § 220(2)(d). Being entrepreneurs, each must invest substantial sums in equip-

ment and bear the risk of any loss attributed to his operation. See *SIDA of Hawaii, Inc. v. N.L.R.B, supra; Brown v. N.L.R.B.*, 462 F.2d 699 (9th Cir.), *cert. denied*, 409 U.S. 1008, 93 S.Ct. 441, 34 L.Ed.2d 301 (1972). It is the owner-operator's responsibility to meet the regulations of the PUC so that he may operate legally. The success of an owner-operator depends upon his own skill and business acumen, and does not depend on that of any contractor. He may work as little as he wants or as much as he can, and for as many different contractors as will hire him. It is unlikely that he will work for any single contractor for an extended length of time. See *Restatement, supra* § 220(2)(f). He does not have a continuing relationship with a contractor in the same sense that an employee has a continuing relationship with an employer. His relationship is ongoing only in that he may do some more work for the contractor some time in the future. In short, owner-operators run businesses completely independent of the contractors, and in the main are not subject to their control. The contractors' only real concern is in the accomplishment of the job for which the owner-operators are hired, to wit, the loading, hauling and dumping of material. Any supervisory activity of the contractors is limited to that which is necessary to accomplish this goal. See *Joint Council of Teamsters No. 42 v. N.L.R.B., supra* (MacKinnon, J., dissenting).

There are other indicia of the independent contractor status of the owner-operators. Although paid on an hourly basis, which is usually an indication of employee status, *Restatement, supra*, § 220(2)(g), the hourly rate reflects amounts attributed to the use of the equipment as well as to the value of the labor. Thus, owner-operators are not paid for the time they are on the jobsite when their equipment is idle. Moreover, the contractors do not make any of the normal deductions from the pay of the owner-operators,

contrary to the practice commonly employed with respect to true employees. Also contrary to the practice used in dealing with employees, each owner-operator is free to reach his own bargain with each contractor as to the amount he is to be paid, limited only by the minimum tariff set by the PUC. We note that all of these considerations were present in *Associated Independent Owner-Operators v. N.L.R.B., supra*, where we reversed a Board decision finding owner-operators of graders employees.

In addition, owner-operators may hire substitute drivers or subcontract the work to another owner-operator without prior permission, or any notification to, the contractor. This is clearly inconsistent with a finding that a personal employer-employee relationship exists. It is further evidence that the owner-operator's truck is his exclusive domain, and that its operation is beyond the authority of the contractor.[10]

In determining whether the owner-operators are employees or independent contractors, the "total factual context" and "all the incidents of the relationship must be assessed and weighed with no one factor being decisive." *N.L.R.B. v. United Insurance Co.*, 390 U.S. at 258, 88 S.Ct. at 991. This the Board failed to do. Instead, it gave inordinate weight to isolated examples of contractor control at the jobsite, control which in the main involved only the result sought to be accomplished.[11] Given the exigencies of a con-

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[10]We also note that contractors do not give owner-operators any instructions on how to operate the dump trucks, nor do they require that the trucks be of a certain type or be maintained in any certain fashion.

[11]We disagree with the majority in *Joint Council of Teamsters No. 42 v. NLRB*, 146 U.S.App.D.C. 275, 450 F.2d 1322 (1971), which held that the owner-operators of dump trucks were employees. That court found that the contractors did exercise sufficient control of the details of the work to outweigh other indicia of independent contractor status. However, we are of the opinion that the D.C. Circuit erred in two respects. First, it failed to consider the relationship as a whole, and second as was the Board in the case before us, it was blinded by presence of the contractors' right to control details of work which were necessary only to insure a smooth running construction job and the accomplishment of the desired result.

struction site, the contractor's reasonable instructions as to trivial matters, such as the timing of the lunch hour, cannot transform what by every other indicia is a contractor-independent contractor relationship into an employer-employee relationship. Looking to the "total factual context" of the relationship which the owner-operators and contractors maintain, we hold that the Board erred in concluding that the owner-operators of dump trucks are employees. This holding does not depart from the spirit of our earlier holding in *Associated Independent Owner-Operators, Inc. v. N.L.R.B., supra.*

We deny enforcement of the Board's decision and order of September, 1975 and remand this case to the Board for further proceedings consistent with this opinion.